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Draft report of the International Law Commission on the work of its seventieth session

Rapporteur: Ms. Patricia **Galvão Teles**

Chapter IV
Subsequent agreements and subsequent practice in relation to the interpretation of treaties

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A. Introduction

1. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[1] At its sixty-first session (2009), the Commission established the Study Group on treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[2]

2. From the sixty-second to the sixty-fourth session (2010-2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairperson, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction;[3] the jurisprudence under special regimes relating to subsequent agreements and subsequent practice;[4] and the subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.[5]

3. At the sixty-fourth session (2012), the Commission, on the basis of a recommendation of the Study Group,[6] decided: (a) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[7]

4. From its sixty-fifth (2013) to sixty-eighth sessions (2016), the Commission considered the topic on the basis of four successive reports submitted by the Special Rapporteur.[8]

5. At its sixty-eighth session (2016), the Commission adopted on first reading a set of 13 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, together with commentaries thereto.[9] It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations.[10]

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[1] At its 2997th meeting, on 8 August 2008. See *Yearbook ... 2008*, vol. II (Part Two), para. 353; and for the syllabus of the topic, *ibid.*, annex I. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[2] *Yearbook ... 2009*, vol. II (Part Two), paras. 220–226.

[3] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 344–354; and *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 337.

[4] *Ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 338–341; and *ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 230–231.

[5] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 232–234. At the sixty-third session (2011), the Chairperson of the Study Group presented nine preliminary conclusions, reformulated in the light of the discussions in the Study Group (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 344). At the sixty-fourth session (2012), the Chairperson presented the text of six additional preliminary conclusions, also reformulated in the light of the discussions in the Study Group (*ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 240). The Study Group also discussed the format in which the further work on the topic should proceed and the possible outcome of the work. A number of suggestions were formulated by the Chairperson and agreed upon by the Study Group (*ibid.*, paras. 235–239).

[6] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 226 and 239.

[7] *Ibid.*, para. 227.

[8] A/CN.4/660 (first report), A/CN.4/671 (second report), A/CN.4/683 (third report) and A/CN.4/694 (fourth report).

[9] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), paras. 75–76.

[10] *Ibid.*, para. 73.

B. Consideration of the topic at the present session

6. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/715), as well as comments and observations received from Governments (A/CN.4/712).

7. At its 3390th, 3391st and 3393rd to 3396th meetings, from 30 April to 7 May 2018, the Commission considered the fifth report of the Special Rapporteur and instructed the Drafting Committee to commence the second reading of the entire set of draft conclusions on the basis of the proposals of the Special Rapporteur, taking into account the comments and observations of Governments and the debate in the plenary on the Special Rapporteur's report.

8. The Commission considered the report of the Drafting Committee (A/CN.4/L.907) at its 3406th meeting, held on 18 May 2018, and adopted the entire set of draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties on second reading (sect. E.1 below).

9. At its … to … meetings, on … 2018, the Commission adopted the commentaries to the aforementioned draft conclusions (sect. E.2 below).

10. In accordance with its statute, the Commission submits the draft conclusions to the General Assembly, together with the recommendation set out below.

C. Recommendation of the Commission

11. …

D. Tribute to the Special Rapporteur

12. At its … meeting, held on … 2018, the Commission, after adopting the commentary to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted the following resolution by acclamation:

"*The International Law Commission*,

"*Having adopted* the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties,

"*Expresses* to the Special Rapporteur, Mr. Georg Nolte, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft conclusions through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties."

E. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties

1. Text of the draft conclusions

13. The text of the draft conclusions adopted by the Commission, on second reading, at its seventieth session is reproduced below.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

Part Two
Basic rules and definitions

Conclusion 2
General rule and means of treaty interpretation

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as provided in article 31, paragraph 1.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

Conclusion 3
Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

Conclusion 4
Definition of subsequent agreement and subsequent practice

1. A subsequent agreement as an authentic means of interpretation under article 31, paragraph 3 (*a*), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (*b*), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Conclusion 5
Conduct as subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Part Three
General aspects

Conclusion 6
Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. Such a position is not taken if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, may take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 may also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Conclusion 8
Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

Conclusion 9
Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. In addition, the weight of subsequent practice under article 31, paragraph 3 (*b*), depends, *inter alia*, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Conclusion 10
Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (*a*) and (*b*), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (*b*), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Part Four
Specific aspects

Conclusion 11
Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of parties to a treaty for the purpose of reviewing or implementing the treaty, except where they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.

Conclusion 12
Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice of the parties under article 31, paragraph 3, or subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31 and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

Conclusion 13
Pronouncements of expert treaty bodies

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (*b*), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

4. This draft conclusion is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates.

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Draft report of the International Law Commission on the work of its seventieth session

Rapporteur: Ms. Patrícia **Galvão Teles**

Chapter V
Identification of customary international law

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1. Text of the draft conclusions .....

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A. Introduction

1. At its sixty-fourth session (2012), the Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Sir Michael Wood as Special Rapporteur.[1] In paragraph 7 of its resolution 67/92 of 14 December 2012, the General Assembly noted with appreciation the decision of the Commission to include the topic in its programme of work. At its sixty-fifth session (2013), the Commission decided to change the title of the topic to "Identification of customary international law".[2]

2. From its sixty-fifth (2013) to sixty-eighth sessions (2016), the Commission considered four reports by the Special Rapporteur,[3] as well as two memorandums by the Secretariat.[4]

3. At its sixty-eighth session (2016), the Commission adopted, on first reading, a set of 16 draft conclusions on identification of customary international law, together with commentaries thereto.[5] It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations.[6]

B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/717), an addendum to that report (A/CN.4/717/Add.1) providing an updated bibliography on the topic, as well as comments and observations received from Governments (A/CN.4/716). The Commission also had before it a memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710).

5. The Commission considered the fifth report of the Special Rapporteur at its 3396th to 3402nd meetings from 7 to 14 May 2018. At its 3402nd meeting, held on 14 May 2018, the Commission referred draft conclusions 1 to 16 to the Drafting Committee, with the instruction that the Drafting Committee commence the second reading of the draft conclusions on the basis of the proposals of the Special Rapporteur, taking into account the comments and observations of Governments and the debate in the plenary on the Special Rapporteur's report.

6. The Commission considered the report of the Drafting Committee (A/CN.4/L.908) at its 3412th meeting, held on 25 May 2018, and adopted the entire set of draft conclusions on identification of customary international law on second reading (sect. E.1 below).

7. At its 3402nd meeting, on 14 May 2018, the Commission decided to establish a working group, to be chaired by Mr. Marcelo Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to the draft conclusions to be

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[1] At its 3132nd meeting, on 22 May 2012 (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 157). The Commission had before it a note by the Special Rapporteur (A/CN.4/653). The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex A to the report of the Commission (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), pp. 305–314). In its resolution 66/98 of 9 December 2011, the General Assembly took note of the inclusion of the topic in the long-term programme of work of the Commission.

[2] *Ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 65.

[3] See A/CN.4/663 (first report), A/CN.4/672 (second report), A/CN.4/682 (third report), A/CN.4/695 and A/CN.4/695/Add.1 (fourth report and addendum thereto).

[4] See A/CN.4/659 (memorandum by the Secretariat) and A/CN.4/691 (memorandum by the Secretariat).

[5] *Official Records of the General Assembly, Seventy-first session, Supplement No. 10* (A/71/10), paras. 57 and 59.

[6] *Ibid.*, para. 60.

adopted by the Commission. The working group held … meetings between … and … May 2018.

8. At its … to … meetings, from … to … 2018, the Commission adopted the commentaries to the aforementioned draft conclusions (sect. E.2 below).

9. At its … meeting, held on … 2018, the Commission requested that the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710) be reissued to reflect the text of the draft conclusions and commentaries adopted on second reading.

10. In accordance with its statute, the Commission submits the draft conclusions to the General Assembly, together with the recommendation set out below.

C. Recommendation of the Commission

11. …

D. Tribute to the Special Rapporteur

12. At its … meeting, held on … 2018, the Commission, after adopting the draft conclusions on identification of customary international law, adopted the following resolution by acclamation:

"*The International Law Commission*,

"*Having adopted* the draft conclusions on identification of customary international law,

"*Expresses* to the Special Rapporteur, Sir Michael Wood, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft conclusions through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft conclusions on identification of customary international law."

E. Text of the draft conclusions on identification of customary international law

1. Text of the draft conclusions

13. The text of the draft conclusions adopted by the Commission, on second reading, at its seventieth session is reproduced below.

Identification of customary international law

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

Part Two
Basic approach

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Conclusion 3
Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Part Three
A general practice

Conclusion 4
Requirement of practice

1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

Part Four
Accepted as law (*opinio juris*)

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Part Five
Significance of certain materials for the identification of customary international law

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(*a*) codified a rule of customary international law existing at the time when the treaty was concluded;

(*b*) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(*c*) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Conclusion 13
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Part Six
Persistent objector

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Part Seven
Particular customary international law

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.

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Chapter VI
Protection of the atmosphere

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B. Consideration of the topic at the present session .....

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Chapter VI
Protection of the atmosphere

A. Introduction

1. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the atmosphere" in its programme of work, subject to an understanding, and appointed Mr. Shinya Murase as Special Rapporteur.[1]

2. The Commission received and considered the first report of the Special Rapporteur at its sixty-sixth session (2014); the second report at its sixty-seventh session (2015); the third report at its sixty-eighth session (2016); and the fourth report at its sixty-ninth session (2017).[2] On the basis of the draft guidelines proposed by the Special Rapporteur in the second, third, and fourth reports, the Commission provisionally adopted nine draft guidelines and eight preambular paragraphs, together with commentaries thereto.[3]

B. Consideration of the topic at the present session

3. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/711), in which the Special Rapporteur, first, addressed the question of implementation of the draft guidelines at the national level. In that regard, he underlined the various modes of such implementation depending on the nature of the obligations concerned, and considered extraterritorial application of national law. Second, he examined the situations in which there was a failure to implement the obligations concerned. Turning to the question of compliance at the international level, the Special Rapporteur explained that he favoured cooperative compliance mechanisms, meant to give assistance to a non-compliant party, over punitive or enforcement mechanisms, which were based on the responsibility of States and intended to place penalties on the non-compliant party. Third, the Special Rapporteur considered the question of dispute settlement. In that connection, he emphasized both the need for the peaceful settlement of disputes and the need to take into account the scientific-heavy and fact-intensive character of environmental disputes, which led to a requirement to assess scientific evidence and ensure that adequate rules of procedure applied to such disputes.

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[1] At its 3197th meeting, on 9 August 2013 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10)), para. 168. The Commission included the topic in its programme of work on the understanding that: "(a) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights; (b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to 'fill' gaps in the treaty regimes; (c) Questions relating to outer space, including its delimitation, are not part of the topic; (d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. The Special Rapporteur's reports would be based on such understanding." The General Assembly, in paragraph 6 of its resolution 68/112 of 16 December 2013, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 365).

[2] A/CN.4/667, A/CN.4/681 and Corr.1 (Chinese only), A/CN.4/692, and A/CN.4/705 and Corr.1, respectively.

[3] *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), paras. 53–54; and *ibid., Seventy-first Session, Supplement No. 10* (A/71/10), paras. 95–96, and *Seventy-second Session, Supplement No. 10* (A/72/10), paras. 66–67.

4. Based on his analysis, the Special Rapporteur proposed three additional draft guidelines concerning implementation (draft guideline 10), compliance (draft guideline 11) and dispute settlement (draft guideline 12). Furthermore, the Special Rapporteur expressed the hope to conclude the first reading of the draft guidelines at the current session.

5. The Commission considered the fifth report of the Special Rapporteur at its 3405th and 3409th to 3413th meetings, on 17, 22, 23, 24, 25 and 29 May 2018, respectively.

6. Following its debate on the report, the Commission, at its 3413th meeting, on 29 May 2018, decided to refer draft guidelines 10 to 12, as contained in the Special Rapporteur's fifth report, to the Drafting Committee, taking into account the debate in the Commission.

7. At its … meeting, on … 2018, the Commission received and considered the report of the Drafting Committee, and provisionally adopted the draft guidelines on the protection of the atmosphere on first reading (see section C.1, below).

8. At its … to … meetings, on … 2018, the Commission adopted the commentaries to the draft guidelines (see section C.2, below).